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# Final Report of the Committee to Study Issues Dealing with Regulatory Takings, 2011

Maine State Legislature

Office of Policy and Legal Analysis

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**STATE OF MAINE  
125<sup>th</sup> LEGISLATURE  
FIRST REGULAR SESSION**

**Final Report  
of the  
COMMITTEE TO REVIEW ISSUES  
DEALING WITH REGULATORY TAKINGS**

**December 2011**

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Sen. Troy D. Jackson  
Rep. Andre E. Cushing III, Chair  
Rep. Joan M. Nass  
Rep. Charles R. Priest  
Peggy Bensinger  
Catherine R. Connors  
Kenneth Davis Jr.  
Pete Didisheim  
Clark A. Granger  
Donald White**

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## **Executive Summary**

The Committee to Review Issues Dealing with Regulatory Takings (herein referred to as “the Regulatory Takings Committee” or the “study committee”) was established by the Legislature to study issues associated with property rights and the public welfare. The study committee was specifically directed to determine if barriers to relief from regulatory takings exist in Maine and to consider 16 legislative elements in determining whether to recommend legislation. The study committee was unable to reach consensus recommendations. This report summarizes information presented and issues discussed at meetings of the study committee and contains the majority and minority recommendations.

Eight members of the study committee conclude that takings provisions in the Maine Constitution and the United States Constitution do not adequately protect private property rights and that legislation is needed to establish a threshold and process for determining when a regulatory taking has occurred. Six of the eight members recommend enacting a cause of action for private property owners when government regulations diminish the market value of a parcel of property by 50% or more. Two of the eight members stated that the threshold for a regulatory takings should be 30% if the current application of the “whole parcel rule” is not modified to allow a court, in determining whether a regulatory takings occurred, to consider only that portion of the property that is most economically impacted by a land use regulation instead of the regulation’s economic impact on the entire parcel.

Those eight members also recommend that the provisions of a regulatory takings law apply prospectively only to state land use regulations enacted after the effective date of legislation enacting a new regulatory takings regime.

Seven study committee members support authorizing an agency to grant a variance to a regulation found to be a regulatory taking as an alternative to paying compensation.

Two members do not support the recommendations of the other eight members and instead recommend a number of measures to enhance landowner participation in the existing land use mediation program established in 5 MRSA §3341 to resolve disputes over land use regulations. These members fully support the findings and recommendations in the Final Report of the Study Commission on Property Rights and the Public Health, Safety and Welfare (December 1995). Both members caution against establishing in statute a threshold percentage in the diminution of property value that constitutes a regulatory taking that is far less than required by the Constitution of Maine or the United States Constitution and creating a cause of action process as proposed in the majority recommendations. These two members assert that implementing the majority’s recommendations will be costly and will create significant legal complexities resulting in increased litigation. They also express concern that enactment of this new regulatory takings standard and process has the potential to undermine laws needed to protect public health, safety, welfare and the environment.

Due to time limitations, the study committee did not draft legislation to implement either the majority or minority recommendations. The study committee trusts that its recommendations are explicit enough for the Joint Standing Committee on Judiciary to develop and report out legislation to the Second Regular Session of the 125th legislature as authorized in Resolve 2001, chapter 111, Sec. 9.

## I. INTRODUCTION

During the First Regular Session of the 125<sup>th</sup> Legislature, the Joint Standing Committee on Judiciary considered two bills proposing processes for landowners to seek compensation for loss in property value due to governmental land use regulations. The Legislature accepted the Judiciary Committee's majority report of "Ought Not to Pass" on one of those bills, LD 1135, An Act to Protect the Rights of Property Owners. The Judiciary Committee voted unanimously to amend the second bill, LD 1477, An Act to Protect Owners of Real Property to establish a study committee with duties to examine issues pertaining to property rights, public welfare and regulatory takings.

LD 1477 as amended passed as an emergency measure Resolve 2011, chapter 111 - Resolve, To Review Issues Dealing with Regulatory Takings (Appendix A). In evaluating possible barriers to relief from regulatory takings, the study committee was directed to:

1. Review the Report of the Study Commission on Property Rights and the Public Health, Safety and Welfare, completed in 1995;
2. Study the experiences of the land use mediation program, established in the Maine Revised Statutes, Title 5, section 3341 to provide private landowners with an independent forum for mediation of governmental land use actions as an alternative to court action;
3. Study regulatory takings legislation considered in other states, including Oregon and Florida;
4. Examine specific cases in which state and municipal laws, regulations, ordinances and investments have affected property values in this State, both positively and negatively; and
5. Suggest measures to mitigate and remove any barriers to relief as may be identified.<sup>1</sup>

Resolve 2011, chapter 11 directs the study committee to submit a report including its findings and recommendations to the Joint Standing Committee on Judiciary no later than December 7, 2011. The Joint Standing Committee on Judiciary is authorized to report out legislation relating to the study committee's report to the Second Regular Session of the 125<sup>th</sup> Legislature.

At a June 28, 2011 meeting, the Legislative Council authorized 3 meetings of the study committee. The study committee's approach to addressing each of the duties outlined in the resolve and a brief description of each meeting's agenda and discussion are provided in the next section of this report.

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<sup>1</sup> Abbreviated from Resolve 2011, chapter 111, Sec. 5 Duties – See Appendix A.

## II. STUDY PROCESS

**1. First meeting of the committee.** At the study committee's first meeting on October 7, 2011, the recommendations of the 1995 Study Commission on Property Rights and the Public Health, Safety and Welfare (1995 commission) were reviewed along with legislation enacted to implement those recommendations.<sup>2</sup>

Maine's Land Use Mediation Program: Public Law 1995, chapter 537 established the Land Use Mediation Program "to provide eligible private landowners with a prompt, independent, inexpensive and local forum for mediation of governmental land use actions." Diane Kenty, the Director of the Court Alternative Dispute Resolution Service (CADRES), administers the land use mediation program along with other mediation and arbitration services through the Maine Administrative Office of the Courts. Ms. Kenty presented a description of the land use mediation program and provided information on its use at the October 7<sup>th</sup> meeting. (Appendix D)

Since its inception in 1996, eleven applications for land use mediation have been received. Five mediations were actually conducted under the program and all five resulted in signed mediation agreements. However, Public Law 1995, chapter 537 specifically states that a municipality is not required to participate in mediation with a landowner applying for mediation services. Legislation proposed by the 1995 commission report prior to the enactment of Public Law 1995, chapter 537 did not include this opt-out provision for municipalities.

Municipalities have declined to enter into mediation requested by landowners under this program. The reluctance of municipalities to mediate in the early days of the program may be one reason for infrequent use of the program to resolve land use disputes. Lack of awareness of the program was also suggested as a possible reason for underutilization.

Rules review: Public Law 1995, chapter 537 amended the statute for review of agency rules, as recommended by the 1995 commission, to prohibit the Attorney General from approving a proposed rule "if it is reasonably expected to result in a taking of private property under the Constitution of Maine unless such a result is directed by law or sufficient procedures exist in law or in the proposed rule to allow for a variance designed to avoid such a taking."<sup>3</sup>

The statute governing legislative review of major substantive rules was also amended as recommended by the 1995 commission. The amended language requires a policy committee reviewing a major substantive rule that is expected to result in a reduction in property values to determine "whether sufficient variance provisions exist in law or in the rule to avoid an unconstitutional taking, and whether, as a matter of policy, the expected reduction is necessary or appropriate for the protection of the public health, safety and welfare advanced by the rule."<sup>4</sup>

Peggy Bensinger, an Assistant Attorney General representing the Attorney General's Office on the study committee, explained the role of the AG's Office in rule review. The AG's

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<sup>2</sup> See Appendix C for a copy of PL 1995, chapter 537.

<sup>3</sup> 5 MRSA §8056, sub-§6

<sup>4</sup> 5 MRSA §8072, sub-§4, ¶ H

Office generally reviews proposed rules before an agency posts the rule and recommends that changes be made such as the inclusion of a variance provision when the AG is concerned that implementation of the rule may result in a constitutional taking. In its formal, final review of a proposed rule for approval the AG's Office will not sign the rule if it violates the prohibition set forth in Public Law 1995, chapter 537 as quoted above and codified in 5 MRSA §8056, sub-§6.

Acquisition of Property by the Maine Department of Transportation (MDOT): Toni Kimmerle, Chief Counsel for MDOT, and Ray Quimby, Senior Appraiser for MDOT, briefed the study committee on the process MDOT uses to acquire private property for public transportation projects. Generally, MDOT acquires property rights by eminent domain and provides the landowner with just compensation based on fair market value. MDOT takes private property through eminent domain either in fee, by easement or with temporary rights that expire at the conclusion of a MDOT project. MDOT has developed a Landowner Guide to the Property Acquisition Process to inform landowners about the process and their rights.

The basic requirements MDOT uses for surveying and appraising property to be acquired are provided in 23 MRSA §153-B. MDOT also provides landowners guidance on appraisals including a list of items not compensable under State law (See Appendix E). MDOT may waive a formal appraisal in cases where the fair market value of property is estimated at \$15,000 or less or in cases where the transaction is not complex. In any case in which MDOT and the owner do not agree on the property value, the department must perform an appraisal.

Takings Law review: As directed in Resolve 2011, chapter 111, the study committee reviewed the 1995 Report of the Study Commission on Property Rights and the Public Health, Safety and Welfare. The analysis of takings law provided in that report and by Peggy Bensinger at the October 7<sup>th</sup> meeting provided background for the committee's work. The committee also reviewed Florida's Bert Harris Act<sup>5</sup> and Florida's Dispute Resolution Act<sup>6</sup> that provide a landowner a right of action to recover compensation or other relief when a government regulation limits an existing use of property in a way that prevents the owner from attaining reasonable, investment-backed expectations use of the property. Florida's Dispute Regulation Act enacted along with the Burt Harris Act is designed to encourage informal resolution of property owners' complaints about regulatory burdens.

The study committee also reviewed Oregon's Measure 37<sup>7</sup> passed as a ballot measure in 2004 that applied retroactively requiring state and local governments to pay just compensation when a regulatory restriction reduces the fair market value of property. The total number of claims submitted to the state under Measure 37 was 6,857 with over \$17 billion in compensation requested. Measure 37 authorized governmental agencies to modify, remove or not apply a challenged regulation to avoid paying compensation. Measure 49 was passed by voters in 2007 to largely replace measure 37. That measure applies prospectively only to regulations enacted after the adoption of Measure 49<sup>8</sup>.

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<sup>5</sup> FLA. STAT. ANN. §§70.001-70.51 (Westlaw 2009)

<sup>6</sup> FLA. STAT. ANN. CH. 70.51 (Westlaw 2009)

<sup>7</sup> OR. REV. STAT. ANN. §195.305 (Westlaw 2009)

<sup>8</sup> OR. REV. STAT. ANN. §310.212 (Westlaw 2009)



Brief summaries of other state's regulatory takings laws considered by the study committee including Florida, Oregon, Louisiana, Texas, Arizona and Mississippi are found in Appendix F.

Discussion: At the end of the first meeting, members expressed concerns that there would not be enough time to complete their work during their two remaining authorized meetings. A significant portion of the committee agreed to meet as a subcommittee on October 17<sup>th</sup> to continue the discussion and develop possible recommendations to be considered at the second meeting. Committee members also agreed to invite Peter Mills who chaired the 1995 study commission to attend the second meeting to respond to questions regarding that commission's report.

**2. Subcommittee Meeting.** An eight-member subcommittee met on October 17, 2011. The members of the subcommittee were Rep. Nass, Rep. Priest, Don White, Peggy Bensinger, Catherine Connors, Clark Granger, Kenneth Davis and Cathy Johnson sitting in for Pete Didisheim.

As directed by the study committee chairs, the subcommittee discussed seven topics relating to regulatory takings, including:

- How to improve the existing land use mediation process;<sup>9</sup>
- Whether to expand the Attorney General's considerations when reviewing proposed rules;
- How to ensure the Maine State Legislature is more aware of regulatory takings issues;
- Whether changes to regulatory takings provisions should apply to state law only or also to municipalities;
- Options that would not impose costs on state or local level government;
- Whether new takings laws should apply retroactively; and
- Options that do not include waivers of existing laws and regulations.

Subcommittee members did not object to any suggestion made to increase awareness and utilization of the land use mediation program. However, some members voiced concern that the mediation program will continue to be underutilized unless the standard for regulatory takings is changed; those members stated that the existing standard is a significant barrier to any private property owner seeking relief through mediation or the courts.

No votes were taken at the October 17<sup>th</sup> subcommittee meeting. The subcommittee reported to the full study committee at its second meeting and provided the committee with a summary of its discussions. (See Appendix G)

**3. Second meeting of the committee.** The study committee held its second meeting on November 4, 2011. The study committee received the subcommittee's report and Peter Mills who served as the chair of the commission and also as the State Senator from Somerset County

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<sup>9</sup> 5 MRSA §3341

at the time, provided information about the deliberations of the 1995 Study Commission on Property Rights and the Public Health, Safety and Welfare.

Mr. Mills, now the Executive Director of the Maine Turnpike Authority, responded to committee questions regarding regulatory takings issues that are not more explicitly addressed in the commission's 1995 report, namely waivers from a law or regulation that would affect a takings and whether the commission considered establishing a threshold percentage in diminution of value to constitute a regulatory takings. Mr. Mills could not recall whether the commission had discussed the use of waivers but thought establishing a "safety valve" that would provide a waiver if a new law or regulation resulted in a severe diminution in property value might be a plausible approach. Mr. Mills said the study commission discussed establishing a 50% diminution in value threshold but it was not proposed for adoption. He also added that the study commission could not develop a general regulatory takings law, because establishing the value of private property affected by a law or regulation is too complex to determine with any certainty.

Mr. Mills provided the study committee with notes on the benefits and burdens of regulations and regulatory takings law. He also offered examples of how the Maine Turnpike Authority establishes a value for private property taken under its eminent domain power. Membership of the 1995 commission and Mr. Mills' notes presented to the committee are provided in Appendices H and I.

As directed by Resolve 2011, chapter 111, the study committee discussed each of the sixteen considerations enumerated in that resolve and voted on all but three at the November 4<sup>th</sup> meeting. The three legislative considerations not developed into a recommendation and voted on included when a regulatory takings case may be brought to court ("ripeness"), whether the "whole parcel rule" should be modified and whether an explicit waiver of sovereign immunity is necessary to effectuate the purpose of a regulatory takings law.

**4. Third and final meeting of the committee.** All study committee members were present for the final meeting on November 21, 2011. The study committee revisited the three items not voted at the previous meeting and reconsidered some elements voted on at the November 4<sup>th</sup> meeting. Rep. Priest and Pete Didisheim presented a draft of the minority report. The next section of this report presents the final majority and minority recommendations of the study committee.

Peggy Bensinger abstained from voting on recommendations and is not supporting either the majority or minority report. Ms. Bensinger serves on the study committee as the Attorney General's representative and as such decided that she could best serve the committee by providing objective legal advice, rather than expressing policy preferences. Ms. Bensinger did advise the committee that the majority recommendations would result in extensive litigation and would require additional agency staff, legal services from the Attorney General's Office and additional judicial resources.

### III. RECOMMENDATIONS

The study committee did not reach consensus on whether the Maine Legislature should enact a statutory definition of regulatory takings and establish a process for landowners to seek compensation or regulatory relief.

Eight members of the study committee conclude that takings provisions in the Maine and U.S. Constitution do not adequately protect private property rights and legislation is needed to establish a threshold for determining when a regulatory taking has occurred. The eight members comprising the majority in this section of the report are: Sen. Thibodeau, Rep. Cushing, Sen. Jackson, Rep. Nass, Catherine Connors, Kenneth Davis, Clark Granger and Donald White. The majority's recommendations are presented in Part A of this section.

Two members, Rep. Priest and Pete Didisheim, oppose the recommendations put forward by the majority of study committee members and offer a minority report and an alternative set of recommendations in Part B of this section.

Peggy Bensinger abstained from voting.

**Part A. Majority Report.** Eight members are united in recommending that the Legislature enact a statutory threshold for determining when a regulatory takings has occurred and a process for landowners to seek relief. Specific recommendations of those on the majority report are presented below under each of the 16 legislation elements that Resolve 2011, chapter 111 directed the study committee to consider.<sup>10</sup> Differing recommendations on some elements are noted. Where no difference is noted, all eight members support the recommendation.

In addition to the 16 elements put forward in the Resolve, the study committee discussed the advisability of authorizing a regulatory agency to grant a variance rather than paying compensation when a taking has occurred. Seven of the majority members recommend including this option in legislation. Senator Troy Jackson opposes granting an agency the authority "not to impose" a law or regulation that has been enacted by or adopted at the direction of the Legislature. This divergence was discussed in the context of element 16, regarding the need to establish a dedicated fund for compensation.

**1. An appropriate definition of "land use regulation" that should be considered in determining whether a regulatory taking has occurred.** A majority of the study committee recommends defining a land use regulation as a state law or regulation that limits the use of real property. The majority recommends limiting the applicability of this definition to laws and rules established by the State or an agency of the State. Additionally, the majority recommends that laws or rules adopted to comply with federal requirements, to protect the public's health and safety or regulate nuisances be exempt from the definition of "land use ordinance."

**2. An appropriate percentage of diminution in value to establish a compensable regulatory taking.** Six members on the majority report recommend 50% as an appropriate diminution in value to establish a compensable regulatory taking. However, Clark Granger and

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<sup>10</sup> See Appendix A – Resolve 2011, chapter 111, Sec. 6

Don White stated that unless the “whole parcel rule” as defined in case law is modified, they recommend adopting a 30% diminution of value as the threshold for seeking relief from a regulatory taking. The majority did not recommend modifying the “whole parcel rule.” (See element 13)

**3. Appropriate governmental agencies and entities to which new regulatory takings standards and procedures should apply.** A majority of the study committee recommends that new regulatory takings standards and procedures apply only to state laws and rules adopted by state agencies. The majority recommends that minimum standards established by the State that municipalities are required to adopt and enforce, such as shoreland zoning, be considered state regulations. In this case, a property owner would file a claim of a regulatory taking against the state. The State, not the municipality, would be responsible for providing relief if a court found a regulatory taking had occurred.

**4. Whether the cumulative effect of multiple land use regulations should be considered in determining whether a compensable regulatory taking has occurred.** The majority recommends that the cumulative effect of multiple prospective land use regulations be taken into consideration by the trier of fact when determining whether a compensable regulatory taking has occurred. If a newly enacted land use regulation results in a 20% diminution in the value of a parcel of private property and four years later another newly enacted regulation results in an additional 35% diminution of value, the property owner could seek relief from a regulatory takings because the cumulative effect is now 55% of the parcel’s value. Under the recommendation for a three year statute of limitation, the landowner would have three years from enactment of the second restriction to initiate a cause of action. (See element 14)

**5. If multiple land use regulations are cumulated to determine whether a compensable regulatory taking has occurred, how compensation should be allocated among the governmental agencies and entities responsible for those land use regulations.** The majority recommends that compensation be the responsibility of the State, not the individual agency responsible for enforcing the law or regulation found to constitute a regulatory takings.

**6. How fair market value is established, including whether written bona fide appraisals are required.** The majority recommends that bona fide appraisals be required to establish fair market value and whether the diminution threshold has been met. The members recommend that the property owner obtain and provide the appraisal.

**7. Whether property value increases resulting from land use regulations should be taken into account.** The majority recommends that property value increases resulting from land use regulations be taken into account when determining the net change in value and if the diminution threshold has been met. Members on the majority report conclude that a licensed real estate appraiser will be able to determine the fair market value of a property and discern the change in value attributable to a newly enacted or adopted law or regulation.

**8. An effective system for resolution of compensable regulatory takings claims, including payment of compensation when appropriate, without resorting to filing a claim in court.** The majority recommends enacting an informal resolution process whereby a landowner

may file a request for an agency to remedy what the landowner believes to be a regulatory taking. It also recommends that a timeframe for the agency to respond to a request be established in statute. In responding, the agency should be required to state its conclusion as to whether a regulatory taking has occurred; what uses would be allowed on the property and if the agency concludes a regulatory taking has occurred, what remedy or relief the State is willing to provide. This resolution system is in addition to and separate from the land use mediation program established under 5 MRSA §3341.

**9. Creation of a Superior Court cause of action seeking appropriate compensation for regulatory takings, including standards for awarding damages.** The majority recommends that a property owner be entitled to a determination by a “fact finder” as to whether a regulatory taking has occurred upon the landowner submitting an appraisal that evidences a 50% or greater diminution in the landowner’s property value caused by a land use regulation. The “fact finder” should be a jury unless the right to a jury trial is waived, in which case it would be a judge. As stated in element 2, Clark Granger and Don White recommend a threshold of 30% if the “whole parcel rule” is not modified.

The majority recommends that the legislation creating the process direct the fact finder to weigh three factors in determining whether a regulatory taking has occurred. Those factors are:

1. The extent of the diminution in value caused by the regulation;
2. The reasonable investment-backed expectations of the property owner at the time the property was acquired; and
3. The character of the use regulated

**10. The appropriateness of awarding attorney's fees and costs to a landowner or governmental entity.** The study committee discussed the potential impacts of not allowing a property owner to recover attorney’s fees and costs including the possibility that only landowners with substantial financial means or those with the most egregious takings cases will file claims if attorney fees and court costs are not recoverable. The majority recommends allowing the prevailing party to seek reasonable attorney's fees and costs as determined by the court.

**11. How to ensure that a claim for a compensable regulatory taking can proceed in a timely manner without unnecessary delay based on ripeness.** Seven members of the majority recommend that the ripeness doctrine that the courts currently apply to regulatory takings cases be modified to allow a landowner to file a regulatory taking claim with the court based on an appraisal indicating the diminution in value threshold has been reached. The property owner would not first need to apply for permission to initiate an activity requiring a permit, license or other agency approval. Members making this recommendation assert that an experienced and credentialed appraiser will be basing the percent diminution in value on the use restrictions imposed by the new regulation and that the property owner and appraiser can communicate with the agency to determine if a permit would likely be issued without completing the application process. This would provide an expedited process for the property owner to

receive relief from a regulatory taking. The State would be allowed to present arguments to the fact finder if the State does not agree with the appraised diminution in value, for example if the State believes that the potential property use upon which the appraisal is based is speculative or that the ability to seek a variance or pursue another use through permitting would result in less than the diminution in value required for a cause of action.

Senator Jackson voted in opposition to this recommendation.

**12. Whether a new compensable regulatory takings program should be applied to existing land use regulations.** The majority recommends that legislation proposing to define a compensable regulatory taking and establish a new process by which a property owner may seek relief apply prospectively only. The cause of action and options for regulatory relief recommended in the majority report would not be available to property owners seeking relief from laws and regulations in effect prior to enactment of legislation to implement these recommendations.

While the committee discussed whether the new provisions should apply to a law enacted or a rule adopted prior to the effective date of any legislation implementing these recommendations but with a delayed effective date that extends beyond that date, the majority did not resolve this issue.

**13. Whether the "whole parcel rule" should be part of a new compensable regulatory takings program.** Six members of the majority recommend that the "whole parcel rule" apply to any new compensable regulatory takings provisions. In 1978, the Supreme Court in Penn Cent. Transp. Co. v. New York City,<sup>11</sup> a regulatory takings case, created the "whole parcel rule" when it stated that "[i]n deciding whether a particular governmental action has effected a taking, this Court focuses . . . [on] the parcel as a whole." This means that in determining whether a regulatory taking has occurred, the court must consider the entire parcel of property and not just the segment affected by the regulation.

Clark Granger and Don White recommend that legislation to establish new regulatory takings provisions specify that only that segment of a parcel affected by the regulation be considered when determining if the threshold diminution in value has been reached. They assert that this approach is fairer to property owners with different size holdings. Both committee members stressed that if this change to the "whole parcel rule" is not adopted, the 50% diminution threshold recommended by the majority in element 2 be reduced to 30 percent.

**14. Establishment of an appropriate statute of limitations for filing claims for compensation for regulatory takings.** The majority recommends a 3-year statute of limitations as currently applies to physical takings under 14 MRSA §868.

**15. Whether a waiver of sovereign immunity is necessary.** In Maine, sovereign immunity is provided under Title 14 MRSA § 8103, which states that "Except as otherwise expressly provided by statute, all governmental entities shall be immune from suit on any and all tort claims seeking recovery of damages. When immunity is removed by this chapter, any claim

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<sup>11</sup> 438 U.S. 104 (1978)

for damages shall be brought in accordance with the terms of this chapter [the Maine Torts Claim Act.]”

Peggy Bensinger, Attorney General’s representative on the committee advised that the establishment of this cause of action in statute would waive sovereign immunity; therefore, no explicit waiver is needed. The majority concluded that no explicit waiver is necessary in legislation to implement its recommendations.

**16. Whether a dedicated state fund should be established to pay claims for compensation.** Members on the majority report find that it is unnecessary to establish a compensation fund at this time because funds for compensating a landowner will be needed only if future laws are enacted by the Legislature or rules are adopted by a state agency that result in a regulatory takings as provided for in this report.

Additionally, seven members of the majority recommend authorizing an agency to grant a variance to a landowner whose property is subject to a law or regulation that constitutes a regulatory taking. No compensation is needed if the State chooses this alternative, reducing any need in the future for a regulatory takings compensation fund.

Senator Jackson agreed that it is not necessary to establish a fund at this point. However, he suggests a fund may be needed in the future if laws and regulations result in a regulatory taking. Senator Jackson does not support authorization for agencies to grant waivers as an alternative to compensating a property owner for lost value. Variances should be granted using the processes and criteria established in statute or rule.

At the last meeting of the study committee, distinctions between waivers and variances were briefly discussed. The seven members of the majority envision an agency and landowner engaging in a process similar to the process by which variances are granted and resulting in an owner being able to maintain property value that, if diminished, is diminished by less than 50 percent, thus eliminating the takings and the need for monetary compensation. The study committee did not have time to fully develop this process.

**Part B. Minority Report written by Representative Priest and Pete Didisheim.** Rep. Priest and Pete Didisheim declined to join in the majority report and issue the following minority report and recommendations.

Over the past two decades, the Maine Legislature has considered multiple bills dealing with the issue of regulatory takings. These measures have been consistently defeated through bipartisan votes as lawmakers focused on three key areas of concern: 1) the substantial and unfunded financial costs of creating a new landowner payment program; 2) the inevitability of increased litigation that would be costly for the State just to defend; and 3) the role such legislation would play in undermining and potentially eviscerating Maine laws needed to protect the health, safety, and welfare of its people. A similar pattern has played out nationwide. Takings measures have been defeated, for example, in California, Washington, Kansas, Montana, and Idaho, and in state legislatures across New England.

Although we are a minority voice on this study committee, we are convinced that the majority of Maine people would strongly oppose the majority report's costly, special interest legislation whose principal beneficiaries will be developers and the lawyers who represent them. We tried on the committee to bring attention to these serious concerns, but now must urge lawmakers to reject the committee majority's recommendations and adopt our recommendations presented at the end of this report. We hope that the Legislature will continue to embrace the well-settled principles of constitutional takings law, as interpreted and applied in thousands of judicial decisions, principles that the majority's recommendations depart from significantly.

As background, it is important to know what happened the last time the Maine Legislature undertook a study to examine this issue. When a takings bill was considered in 1995, the bill could not garner sufficient votes for passage, so it was turned into a "study bill," much like what happened in 2011 with LD 1477. The difference, however, is that the 1995 study involved a 24-member, takings commission with broad representation that was directed to dig deeply into the issues. That commission, chaired by Senator Peter Mills, held five meetings at which testimony was taken from 23 experts, and two public hearings at which the commission heard directly from Maine people. At the end of that process, the 1995 commission unanimously recommended creation of a land use mediation program, which was enacted into law with unanimous support of the Legislature. That program remains in place today and is the central focus of our recommendations. We believe that the existing land use mediation program should be improved, rather than embarking down the risky path proposed by the committee majority.

Unlike the 1995 takings commission, this year's study process was perfunctory and gave only superficial treatment to a few issues. Only three meetings were held, providing little time to examine the major legal, fiscal, and policy issues associated with takings legislation. The committee accepted no public comments and solicited testimony from only three individuals. The committee gathered no evidence to demonstrate the existence of a problem for which such extraordinary legislative action is needed, and no such evidence is provided in the majority report.

Listed below are some of our specific concerns with the committee majority's proposal.

**1. No funding provided.** The committee majority's proposed approach purports to create a major compensation program, but provides no funding to actually compensate landowners – thus exposing the State's Treasury to unappropriated and unbounded potential financial liability. The committee majority claims that no money needs to be provided because the bill would be prospective and only affect future lawmaking. But that view ignores the fact that the proposed approach would create major new costs for the State's attorneys, state agencies, and the courts, in addition to payments to developers and landowners to ensure that they comply with Maine law.

Cost estimates for takings bills in other states have been sizable. For example, a takings bill that was defeated by the Maine Legislature in 1995 had a fiscal note of \$15 million over two years. Washington State defeated a takings bill estimated to cost \$11 billion. Oregon's takings measure resulted in nearly \$20 billion in compensation claims before it was largely repealed, and



Montana estimated that a 2010 (subsequently withdrawn) takings measure would cost an estimated \$600 million annually.

The committee majority's assertion that the State will not need to pay anybody anything depends on two dubious assumptions: 1) that the Maine Legislature will stop legislating on land use issues that protect the public interest in our communities, natural resources and environment; and 2) that the people of Maine will be comfortable with widespread waivers of compliance with Maine laws – even if doing so harms their neighborhoods and property values.

Because no funding is provided, the committee majority's approach would shift a possible fiscal note onto future legislation – potentially crippling the ability of the State to enact a broad range of policies needed to respond to changing needs, technologies and conditions. Further, the imprecision of the majority's criteria for determining when a compensable taking occurs means that costs going forward, while unpredictable, will be inevitable and not necessarily even tied to the passage of new legislation. For example, it is easy to envision an enterprising lawyer arguing that the application of existing laws or regulations, or updated rules, are “new” because of a new interpretation given them by a regulatory body. Such interpretations could provide the basis for claims for compensation from the state.

Put simply, the committee majority's recommendation does not represent sound fiscal policy.

**2. Costly litigation is guaranteed.** The committee majority's recommendations would lead to a significant increase in litigation, since many aspects of the proposed approach would be the subject of debatable interpretations – with courts, private attorneys and the Maine Attorney General plowing uncharted ground divorced from well-settled principles of constitutional takings law. The Attorney General's representative on the study committee advised the study committee that the majority recommendations would result in extensive litigation and would require additional agency staff, legal services from the Attorney General's Office, and additional judicial resources.<sup>12</sup> This has been the consistent view from the Attorney General's Office since the first major takings bill was considered in 1995. At that time, Maine Attorney General Andrew Ketterer warned lawmakers that the pending takings bill “would spawn extraordinary, even unprecedented, amounts of litigation involving potentially staggering fiscal impacts.”<sup>13</sup>

**3. The majority's proposed 50% diminution in value has no foundation in the U.S. Constitution.** The proposed standard of 50% diminution of the pre-regulatory property value has no foundation in constitutional takings law, will have no precision in practice, and is certain to be a point of extensive debate, argument, and litigation. There is no need to establish this threshold because for essentially every state it is set by the takings clause of the U.S. Constitution as interpreted and applied in thousands of judicial opinions.

Moreover, this standard is likely to be meaningless in practice. As explained to the committee by an experienced assessor, a person who is knowledgeable of the real estate market may anticipate a change in property values in response to a new land use regulation, but

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<sup>12</sup> See committee report Section II, subsection 4, for the comments of the Attorney General's representative.

<sup>13</sup> Maine Attorney General Andrew Ketterer, May 3, 1995, letter to the Judiciary Committee.

quantifying the near term impact and predicting the long term impact of a specific regulation is almost impossible.<sup>14</sup> The task of attributing precise property value changes to regulatory actions goes from “almost impossible” to “beyond impossible” when one considers the additional complicating factor that compensation claims, under the committee majority’s recommendation, could be based on cumulative regulations, including those that both increase and decrease property values. The study committee majority provides no evidence that complex diminution calculations envisioned could be made; rather, the majority report simply asserts that a licensed real estate appraiser could do so.

**4. Waivers would result in a patchwork of compliance with Maine laws.** The majority acknowledges that the State is not likely to have funding to pay compensation claims, and instead would resort to ad hoc waivers (“special exemptions”) that would allow agencies to “not impose” the law for certain landowners. The idea that Maine laws would be lifted for some property owners and not for others has sweeping implications. Such an approach would create an irresistible incentive for landowners to inflate development plans in order to make compensation claims against the State, and, if they prevailed, receive a waiver from Maine law to pursue a project that they may never have realistically planned on building. This approach played out in Oregon, where landowners filed compensation claims asserting that land use laws blocked their ambitions to construct billboards, casinos, tourist centers, RV parks, strip malls, shopping centers, industrial parks, hotels, golf courses, marinas, mines, and power plants.<sup>15</sup> One landowner claimed that regulations deprived him from building a one-million square-foot mega-mall on protected farmland.

The granting of waivers almost certainly would give rise to lawsuits by property owners who contend that a waiver on a neighbor’s land has reduced their own property values. It is important to recognize that the very purpose of many land use and environmental laws is to protect the community, including neighbors whose property values would be jeopardized by regulatory waivers granted to adjoining developers. The fundamental purpose of future land use laws could become meaningless if property owners could secure waivers that relieved them of constraints that the Legislature had deemed necessary to protect the public interest.

**5. Surrenders Maine’s ability to protect the interests of Maine people.** Under the committee majority’s proposed approach, Maine could literally lose control of its ability to manage the location and scale of significant development projects and their impacts on land and natural resources. Existing land use laws would be frozen in place, affecting a broad array of possible future legislation, including many laws that cannot now even be imagined – thus guaranteeing unanticipated consequences.

The majority’s recommendations would create a significant disincentive to the Legislature to enact any future land use laws. Any new restriction on the use of a building or structure or any right associated with land would be subject to the majority’s proposed regulatory taking approach, regardless of the fact that such a restriction *may be necessary to protect private*

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<sup>14</sup>William Van Tuinen, Assessor, “Information Regarding Specific Cases of Laws or Regulations Affecting Property Values,” November 4, 2011, OPLA memo to the Study Committee. (See Appendix J)

<sup>15</sup> John D. Echeverria & Thekla Hansen-Young, The Track Record on Takings Legislation: Lessons from Democracy’s Laboratories, 28 Stanford Environmental Law Journal, (2009), p.483.

*property values and the surrounding community.* For example, state efforts to protect deer yards, regulate casinos, restrain or encourage commercial energy projects, regulate mining, further restrict nuclear waste disposal, direct the location of major transmission lines and even laws affecting landlord-tenant relationships, could all trigger compensation claims. It is impossible to conjure the full reach of the proposed approach, not to mention its financial and regulatory impacts.

For illustration, if the State adopted new sound regulations that had the result of curbing the size and scale of an allowable activity (e.g. number of wind turbines on a property or an industrial operation), then a takings claim or regulatory waiver could be triggered. Under the majority's approach, the State and the Legislature would face a perpetual threat of compensation claims every time actions were to be taken to protect Maine communities and people. In Florida, attorneys for developers reportedly threaten to file claims under that state's regulatory takings law (the "Bert Harris Act") as a routine part of conversations with government officials about land use issues. One attorney, for example, has boasted about having asserted claims under the Florida law "hundreds of times."<sup>16</sup>

We do not believe lawmakers should create barriers that would impair the Legislature's duty to legislate when future public needs demand.

**6. Exempting municipalities won't shield towns from impacts.** The committee majority recommends exempting municipalities, but the separation between the State and its municipalities is not so clear-cut. Implementation of many State laws (e.g. shoreland zoning, plumbing code) is delegated to municipalities. Thus, the committee majority's approach would give rise to the scenario of the State paying compensation claims, or granting waivers, for actions taken by municipalities. Such waivers by the State would have significant impacts on municipalities, and on local property owners. Towns would have no control over those decisions, yet waivers could cause landowners to file lawsuits against towns because of the uneven application of state-mandated ordinances and laws and the impact of waivers on their property values. That is what happened in Oregon, where more than 400 lawsuits were filed in connection with their short-lived experience with a takings law, including lawsuits challenging the granting of waivers.<sup>17</sup>

The study committee majority proposal would be a recipe for increased conflict between towns and the state, landowners and their towns, and landowners and their neighbors. Municipalities also should be concerned that the exemption could be eliminated. In Texas, for example, legislation has been introduced to eliminate the municipal exemption in that state's takings law.

**7. Failure to demonstrate that there is a problem.** There was no evidence presented during the study committee meetings that a problem exists for which the committee majority's extraordinary proposal is needed. In fact, the suggestion that Maine's environmental laws are broadly reducing property values runs counter to evidence submitted by the representative of the

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<sup>16</sup> John D. Echeverria & Thekla Hansen-Young, The Track Record on Takings Legislation: Lessons from Democracy's Laboratories, 28 Stanford Environmental Law Journal, (2009), p.464.

<sup>17</sup> Oregon Measure 37 lawsuits [http://www.oregonattorneygeneral.gov/hot\\_topics/measure37litigation.shtml](http://www.oregonattorneygeneral.gov/hot_topics/measure37litigation.shtml)

Attorney General's Office citing data from Maine's Department of Environmental Protection (DEP) regarding the issuance of land use permits.<sup>18</sup> (See also Appendix K) As the following data demonstrates, virtually all permits submitted in Maine are approved:

- Natural Resource Protection Act (NRPA) Permits – 99.7% approved over the past 10 years (4,448 applications; 32 denied)
- Site Law Permits—99.99% approved over the past 10 years (2,647 applications; 3 denied)
- Significant Vernal Pools Permits – 100% of the permit requests to build in the 250 foot consultation zone have been approved (16 applications; 0 denied, since 2006)
- Inland Wading Bird and Waterfowl Habitat – 100% approved since 2006
- Shorebird Habitat – 98.5% approved (138 permits; 2 denied since 2006; these were near particularly high value wetlands for both waterfowl and shorebirds)

Because the actual record of DEP permit denials does not demonstrate a problem, the committee majority recommends that property owners not be required to go through a full permitting process – and receive permit denials – before pursuing a compensation claim. Under the committee majority's approach, the normal "ripeness" considerations would be abandoned and replaced with a vague and unprecedented "informal resolution process" whereby individuals (presumably with their attorneys in tow) could go directly to DEP for a staff determination of whether a taking has occurred and to seek a waiver. DEP staff could be over-run with parties demanding assessments of development possibilities on their land, including speculative proposals, and DEP staff could be in the position of granting waivers of Maine laws in a fashion that, again, invites litigation and conflict over land use. This concept would thrust Maine into uncharted waters – with major potential costs and consequences.

### **Minority Recommendation**

For these reasons, we urge the Legislature to reject the recommendations put forward in the committee's majority report, which would create a costly new landowner payment program, spur significant and expensive litigation, cause unintended consequences, and undermine Maine's ability to manage important future land use and environmental challenges.

We recommend instead that measures be taken – many not requiring legislation – that would improve the land use mediation program established in 1995 as an outgrowth of the much more thorough takings study done at that time. Maine's land use mediation program, the

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<sup>18</sup> Correspondence from Bureau of Land Water Quality to Maine Audubon in response to a FOA requested dated January 31, 2011.

purpose of which is to create a forum for landowners to have their grievances heard by a court-appointed mediator, could be strengthened in the following ways.

- Direct appropriate state agencies to promote the program on their websites.
- Direct the mediation program administrator to send informative brochures explaining the program to all municipalities with a request for them to post the brochures in their offices.
- Direct state agencies and municipalities to provide the brochure to every applicant who is denied a permit.
- Direct the mediation program administrator to develop a user friendly website for the program.
- Direct the newly-appointed Special Advocate in the Department of the Secretary of State to provide the brochure to businesses that are pursuing permit applications with state agencies.

## **APPENDIX A**

**Resolve 2011, Chapter 111 – Resolve to Review Issues Dealing with Regulatory Takings**

## **Resolve, To Review Issues Dealing with Regulatory Takings**

**Emergency preamble. Whereas,** acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

**Whereas,** the Committee to Review Issues Dealing with Regulatory Takings is established to study issues associated with property rights and the public welfare; and

**Whereas,** the study must be initiated before the 90-day period expires in order that the study may be completed and a report submitted in time for submission to the next legislative session; and

**Whereas,** in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore, be it

**Sec. 1 Committee established. Resolved:** That, notwithstanding Joint Rule 353, the Committee to Review Issues Dealing with Regulatory Takings, referred to in this resolve as "the committee," is established; and be it further

**Sec. 2 Committee membership. Resolved:** That the committee consists of 11 members appointed as follows:

1. Two members of the Senate appointed by the President of the Senate, including one member from each of the 2 parties holding the largest number of seats in the Legislature;
2. Three members of the House of Representatives appointed by the Speaker of the House, including no more than 2 members from the party holding the largest number of seats in the Legislature;
3. One member representing private property owners with over 100 acres of real property, appointed by the President of the Senate. The President of the Senate may consider recommendations made by the Maine Farm Bureau, the Maine Forest Products Council and the Small Woodland Owners Association of Maine;
4. One member representing municipal government, appointed by the President of the Senate. The President of the Senate may consider recommendations made by the Maine Municipal Association;
5. One member representing conservation interests, appointed by the President of the Senate. The President of the Senate may consider recommendations made by the Natural Resources Council of Maine, the state chapter of the Nature Conservancy and Maine Audubon;
6. One member representing the business sector, appointed by the Speaker of the House. The Speaker of the House may consider recommendations from the Maine State Chamber of Commerce and the Maine National Federation of Independent Business;
7. One member representing private attorneys who have experience practicing in the subject area of takings law in the State, appointed by the Speaker of the House; and
8. The Attorney General or the Attorney General's designee; and be it further

**Sec. 3 Chairs. Resolved:** That the first-named Senate member is the Senate chair and the first-named House of Representatives member is the House chair of the committee; and be it further

**Sec. 4 Appointments; convening of committee. Resolved:** That all appointments must be made no later than 30 days following the effective date of this resolve. The appointing authorities shall notify the Executive Director of the Legislative Council once all appointments have been completed. After appointment of all members, the chairs shall call and convene the first meeting of the committee. If 30 days or more after the effective date of this resolve a majority of but not all appointments have been made, the chairs may request authority and the Legislative Council may grant authority for the committee to meet and conduct its business; and be it further

**Sec. 5 Duties. Resolved:** That the committee shall study the issues associated with property rights and the public welfare. In examining these issues, the committee shall review whether barriers to relief from a regulatory taking currently exist. The committee may, without limitation, in the course of evaluating whether such barriers exist:

1. Review and analyze the Report of the Study Commission on Property Rights and the Public Health, Safety and Welfare, completed in 1995, and the recommendations made in the report;
2. Study the experiences of the land use mediation program, established in the Maine Revised Statutes, Title 5, section 3341 by the 117th Legislature for the purpose of providing private landowners with an independent forum for mediation of governmental land use actions as an alternative to court action;
3. Study regulatory takings legislation considered in other states, including Oregon and Florida, and also states where such legislation has been considered and not adopted and the experiences of landowners, municipalities, State Government and the public. The committee shall evaluate fiscal, legal and policy matters raised by these laws;
4. Examine specific cases in which state and municipal laws, regulations, ordinances and investments have affected property values in this State, both positively and negatively; and
5. Suggest measures to mitigate and remove any barriers to relief as may be identified; and be it further

**Sec. 6 Consideration of legislation elements. Resolved:** That the committee in determining whether to recommend legislation as part of its report shall consider at least the following legislation elements:

1. An appropriate definition of "land use regulation" that should be considered in determining whether a regulatory taking has occurred;
2. An appropriate percentage of diminution in value to establish a compensable regulatory taking;
3. Appropriate governmental agencies and entities to which new regulatory takings standards and procedures should apply;
4. Whether the cumulative effect of multiple land use regulations should be considered in determining whether a compensable regulatory taking has occurred;
5. If multiple land use regulations are cumulated to determine whether a compensable regulatory taking has occurred, how compensation should be allocated among the governmental agencies and entities responsible for those land use regulations;
6. How fair market value is established, including whether written bona fide appraisals are



required;

7. Whether property value increases resulting from land use regulations should be taken into account;

8. An effective system for resolution of compensable regulatory takings claims, including payment of compensation when appropriate, without resorting to filing a claim in court;

9. Creation of a Superior Court cause of action seeking appropriate compensation for regulatory takings, including standards for awarding damages;

10. The appropriateness of awarding attorney's fees and costs to a landowner or governmental entity;

11. How to ensure that a claim for a compensable regulatory taking can proceed in a timely manner without unnecessary delay based on ripeness;

12. Whether a new compensable regulatory takings program should be applied to existing land use regulations;

13. Whether the "whole parcel rule" should be part of a new compensable regulatory takings program;

14. Establishment of an appropriate statute of limitations for filing claims for compensation for regulatory takings;

15. Whether a waiver of sovereign immunity is necessary; and

16. Whether a dedicated state fund should be established to pay claims for compensation; and be it further

**Sec. 7 Staff assistance. Resolved:** That the Legislative Council shall provide necessary staffing services to the committee; and be it further

**Sec. 8 Reimbursement. Resolved:** That public members of the committee are not entitled to reimbursement for expenses; and be it further

**Sec. 9 Report. Resolved:** That, no later than December 7, 2011, the committee shall submit a report that includes its findings and recommendations, including suggested legislation, to the Joint Standing Committee on Judiciary. The Joint Standing Committee on Judiciary may report out legislation relating to the report to the Second Regular Session of the 125th Legislature.

**Emergency clause.** In view of the emergency cited in the preamble, this legislation takes effect when approved.

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## **APPENDIX B**

### **Membership list, Review Issues Dealing with Regulatory Takings**

# Committee to Review Issues Dealing with Regulatory Takings

Resolve 2011, Chapter 111

Friday, December 2, 2011

## Appointment(s) by the President

**Sen. Michael D. Thibodeau - Chair**  
169 Coles Corner Road  
Winterport, Maine 04496

Senate Member

**Sen. Troy D. Jackson**  
167 Allagash Road  
Allagash, ME 04774  
207 436-0763

Senate Member

**Kenneth Davis Jr.**  
P.O. Box 159  
East Machias, ME 04630

Representing Municipal Government

**Pete Didisheim**  
3 Wade Street  
Augusta, ME 04330

Representing Conservation Interests

**Donald White**  
P.O. Box 637  
Bangor, ME 04402

Representing Private Property Owners Over 100 Acres

## Appointment(s) by the Speaker

**Rep. Andre E. Cushing III - Chair**  
P.O. Box 211  
Hampden, ME 04444

House Member

**Rep. Charles R. Priest**  
9 Bowker Street  
Brunswick, ME 04011  
207 725-5439

House Member

**Catherine R. Connors**  
8 Fairfield Drive  
Kennebunk, ME 04043-7643

Representing Private Attorneys

**Clark A. Granger**  
191 Phipps Point Road  
Woolwich, ME 04578

Representing Business Sector

**Rep. Joan M. Nass**  
P.O. Box 174  
Acton, ME 04001

House Member

## Attorney General

**Peggy Bensinger**  
Office of Attorney General  
6 SHS  
Augusta, ME 04333

Attorney General's Designee

## **APPENDIX C**

**Public Law 1995, Chapter 537 - Public Law 1995, Chapter 537 - An Act to  
Implement the Recommendations of the Study Commission on Property Rights and  
the Public Health, Safety and Welfare Establishing a Land Use Mediation Program  
and Providing for Further Review of Rules**

## CHAPTER 537

H.P. 1188 - L.D. 1629

**An Act to Implement the  
Recommendations of the Study  
Commission on Property Rights and  
the Public Health, Safety and  
Welfare Establishing a Land Use  
Mediation Program and Providing  
for Further Review of Rules**

PUBLIC LAW, c. 537

SECOND REGULAR SESSION - 1995

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 2 MRSA §8 is enacted to read:

**§8. Land use mediation; obligation to participate**

Agencies within the executive branch shall participate in mediation under Title 5, chapter 314, subchapter II, when requested to participate by the Court Mediation Service. This section is repealed October 1, 2001.

Sec. 2. 4 MRSA §18, sub-§6-B is enacted to read:

**6-B. Land use mediation.** The land use mediation program is a program within the Court Mediation Service.

A. The Director of the Court Mediation Service shall administer the land use mediation program established in Title 5, chapter 314, subchapter II.

B. A land use mediation fund is established as a nonlapsing, dedicated fund within the Administrative Office of the Courts. Fees collected for mediation services pursuant to Title 5, chapter 314, subchapter II must be deposited in the fund. The Administrative Office of the Courts shall use the resources in the fund to cover the costs of providing mediation services as required under Title 5, chapter 314, subchapter II.

This subsection is repealed October 1, 2001. Any balances remaining in the land use mediation fund must be transferred to a nonlapsing account within the Judicial Department to be used to defray mediation expenses.

Sec. 3. 5 MRSA c. 314 is amended by repealing the chapter headnote and enacting the following in its place:

### CHAPTER 314

#### COORDINATION OF LAND USE AND NATURAL RESOURCE MANAGEMENT

##### SUBCHAPTER I

##### LAND AND WATER RESOURCES COUNCIL

Sec. 4. 5 MRSA §3331, sub-§5 is enacted to read:

**5. Reporting on the land use mediation program.** The council shall report by December 1, 1998 and December 1, 2000 to the Governor, the Administrative Office of the Courts, the Executive Director of the Legislative Council and the Director of the Court Mediation Service on the operation and

effectiveness of the land use mediation program established under subchapter II. The reports must list the number and type of mediation requests received, the number of mediation sessions conducted, the number of signed mediation agreements, a summary of the final disposition of mediation agreements, a narrative discussion of the effectiveness of the program as determined by the council, a summary of deposits and expenditures from the land use mediation fund created in Title 4, section 18, subsection 6-B and any proposals by the council with respect to the operation, improvement or continuation of the mediation program. This subsection is repealed October 1, 2001.

Sec. 5. 5 MRSA c. 314, sub-c. II is enacted to read:

##### SUBCHAPTER II

##### LAND USE MEDIATION PROGRAM

##### §3341. Land use mediation program

**1. Program established.** The land use mediation program is established to provide eligible private landowners with a prompt, independent, inexpensive and local forum for mediation of governmental land use actions as an alternative to court action.

**2. Provision of mediation services; forms, filing and fees.** The Court Mediation Service created in Title 4, section 18 shall provide mediation services under this subchapter. The Court Mediation Service shall:

A. Assign mediators under this subchapter who are knowledgeable in land use regulatory issues and environmental law;

B. Establish a simple and expedient application process. Not later than February 1st of each year, the Court Mediation Service shall send to the chair of the Land and Water Resources Council a copy of each completed application received and each agreement signed during the previous calendar year; and

C. Establish a fee for services in an amount not to exceed \$175 for every 4 hours of mediation services provided. In addition, the landowner is responsible for the costs of providing notice as required under subsection 7.

**3. Application; eligibility.** A landowner may apply for mediation under this subchapter if that landowner:

A. Has suffered significant harm as a result of a governmental action regulating land use;

B. Applies for mediation under subsection 4 within the time allowed under law or rules of the court for filing for judicial review of that governmental action;

C. Has:

(1) For mediation of municipal governmental land use action, sought and failed to obtain a permit, variance or special exception and has pursued all reasonable avenues of administrative appeal; or

(2) For mediation of state governmental land use action, sought and failed to obtain governmental approval for a land use of that landowner's land and has a right to judicial review under section 11001 either due to a final agency action or the failure or refusal of an agency to act; and

D. Submits to the Superior Court clerk all necessary fees at the time of application.

4. Submission of application for mediation. A landowner may apply for mediation under this subchapter by filing an application for mediation with the Superior Court clerk in the county in which the land that is the subject of the conflict is located. The Superior Court clerk shall forward the application to the Court Mediation Service.

5. Stay of filing period. Notwithstanding any other provision of law, the period of time allowed by law or by rules of the court for any person to file for judicial review of the governmental action for which mediation is requested under this subchapter is stayed for 30 days beyond the date the mediator files the report required under subsection 12 with the Superior Court clerk, but in no case longer than 120 days from the date the landowner files the application for mediation with the Superior Court clerk.

6. Purpose; conduct of mediation. The purpose of a mediation under this subchapter is to facilitate, within existing land use laws, ordinances and regulations, a mutually acceptable solution to a conflict between a landowner and a governmental entity regulating land use. The mediator, whenever possible and appropriate, shall conduct the mediation in the county in which the land that is the subject of the conflict is located. When mediating that solution, the mediator shall balance the need for public access to proceedings with the flexibility, discretion and private caucus techniques required for effective mediation.

7. Schedule; notice; participants. The mediator is responsible for scheduling all mediation sessions. The mediator shall provide a list of the names and addresses and a copy of the notice of the

mediation schedule to the Superior Court clerk, who shall mail the notices. The mediator shall include on the list persons identified in the following ways.

A. The landowner and the governmental entity shall provide to the mediator the names and addresses of the parties, intervenors and other persons who significantly participated in the underlying governmental land use action proceedings.

B. Any other person who believes that that person's participation in the mediation is necessary may file a request with the mediator to be included in the mediation.

C. The mediator shall determine if any other person's participation is necessary for effective mediation.

8. Parties to mediation. A mediator shall include in the mediation process any person the mediator determines is necessary for effective mediation, including persons representing municipal, county or state agencies and abutters, parties, intervenors or other persons significantly involved in the underlying governmental land use action. A mediator may exclude or limit a person's participation in mediation when the mediator determines that exclusion or limitation necessary for effective mediation. This subsection does not require a municipality to participate in mediation under this subchapter.

9. Sharing of costs. Participants in the mediation may share the cost of mediation after the initial 4 hours of mediation services have been provided.

10. Admissibility. The admissibility in court of conduct or statements made during mediation, including offers of settlement, is governed by the Maine Rules of Evidence, Rule 408(a) for matters subsequently heard in a state court and Federal Rules of Evidence, Rule 408 for matters subsequently heard in a federal court.

11. Agreements. A mediated agreement must be in writing. The landowner, the governmental entity and all other participants who agree must sign the agreement as participants and the mediator must sign as the mediator.

A. An agreement that requires any additional governmental action is not self-executing. If any additional governmental action is required, the landowner is responsible for initiating that action and providing any additional information reasonably required by the governmental entity to implement the agreement. The landowner must notify the governmental entity in writing within

30 days, after the mediator files the mediator's report under subsection 12, that the landowner will be taking action in accordance with the agreement.

B. Notwithstanding any procedural restriction that would otherwise prevent reconsideration of the governmental action, a governmental entity may reconsider its decision in the underlying governmental land use action in accordance with the agreement as long as that reconsideration does not violate any substantive application or review requirement.

**12. Mediator's report.** Within 90 days after the landowner files an application for mediation, the mediator shall file a report with the Superior Court clerk. The mediator shall file the report as soon as possible if the mediator determines that a mediated agreement is not possible. The report must contain:

A. The names of the mediation participants, including the landowner, the governmental entity and any other persons;

B. The nature of any agreements reached during the course of mediation, which mediation participants were parties to the agreements and what further action is required of any person;

C. The nature of any issues remaining unresolved and the mediation participants involved in those unresolved issues; and

D. A copy of any written agreement under subsection 11.

**13. Application.** This subchapter applies to final agency actions and failures and refusals to act occurring after the effective date of this subchapter.

**14. Repeal.** This subchapter is repealed October 1, 2001.

**Sec. 6. 5 MRSA §8056, sub-§6,** as enacted by PL 1981, c. 524, §13, is amended to read:

**6. Attorney General review and approval.** The review required in subsection 1 shall ~~may~~ not be performed by any person involved in the formulation or drafting of the proposed rule. The Attorney General may not approve a rule if it is reasonably expected to result in a taking of private property under the Constitution of Maine unless such a result is directed by law or sufficient procedures exist in law or in the proposed rule to allow for a variance designed to avoid such a taking.

**Sec. 7. 5 MRSA §8072, sub-§4, ¶¶F and G,** as enacted by PL 1995, c. 463, §2, are amended to read:

F. Whether the provisionally adopted rule could be made less complex or more readily understandable for the general public; and

G. Whether the provisionally adopted rule was proposed in compliance with the requirements of this chapter and with requirements imposed by any other provision of law; and

**Sec. 8. 5 MRSA §8072, sub-§4, ¶H** is enacted to read:

H. For a rule that is reasonably expected to result in a significant reduction in property values, whether sufficient variance provisions exist in law or in the rule to avoid an unconstitutional taking, and whether, as a matter of policy, the expected reduction is necessary or appropriate for the protection of the public health, safety and welfare advanced by the rule.

**Sec. 9. Allocation.** The following funds are allocated from Other Special Revenue funds to carry out the purposes of this Act.

1996-97

## JUDICIAL DEPARTMENT

### Land Use Mediation Fund

All Other	\$5,000
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Allocates funds to cover the cost of providing mediation services.

See title page for effective date.

## **APPENDIX D**

### **Summary of the Land Use Mediation Program Pursuant to 5 MRSA § 3341**



Diane E. Kenty, Director  
Court Alternative Dispute Resolution Service (CADRES)  
Maine Administrative Office of the Courts  
diane.kenty@courts.maine.gov  
822-0719  
October 7, 2011

**Land Use Mediation Pursuant to 5 M.R.S. § 3341**

- Established 1996
- Administered by CADRES, an office within Administrative Office of the Courts established pursuant to 4 M.R.S. § 18-B - CADRES also administers 7 other statewide mediation rosters for mediation, arbitration and early neutral evaluation in various types of court cases

**CADRES Duties (§ 3341(2))**

- Assign mediators – CADRES created a statewide roster with specific qualification (list of qualifications and list of mediators attached)
- Establish a “simple and expedient” application process – CADRES created a very simple application form for a landowner to use (copy attached)
- Establish a fee - Landowner pays only the mediation fee of \$175; court doesn’t charge filing fee usually needed to start new case
- Also created a brochure to describe this mediation option (copy attached)

**Steps for Mediation**

- Landowner fills out application at the Superior Courthouse in county where property is located and pays fee of \$175 (§ 3341(6))
- Clerk sends application to me, and I contact parties to assist them in selecting mediator - send them list of mediators on the Land Use/Environmental Mediation Roster to see if they can find a mutually agreeable mediator
- Once they select mediator, the mediator works with them to set time and place of mediation and figure out who will participate
- Written notice of mediation is sent
- Mediation session held; any agreement has to be signed and in writing (§ 3341(11))
- Mediator sends copies of any agreement to clerk and CADRES (§ 3341(12))

### Landowners Eligible for Mediation (§ 3341(3))

- Statute limits this option to only certain situations
- Private landowner must have “suffered significant harm as result of governmental action regulating land use” AND must have:
  - Applied for a permit, variance or special exception from municipality and have pursued all reasonable avenues of administrative review, OR
  - Sought and failed to obtain approval for a land use from a state agency and have a right to seek judicial review

### Usage

- 5 land use disputes actually mediated
- All 5 disputes resolved in mediation
- 6 other applications for mediation submitted, but the municipalities declined to mediate, or parties settled the matter before mediation held - Ability of municipality to decline to participate is based on § 3341(8): “This subsection does not require a municipality to participate in mediation under this chapter.”
- Also received other telephone inquiries

### Reports from Land and Water Resources Council (LWRC)

- Provided information to LWRC (State Planning Office) about applications received and mediation conducted (§ 3341(2)(B))
- Copies of Land and Water Resources Council reports provided to legislative analyst

STATE OF MAINE

SUPERIOR COURT

\_\_\_\_\_, ss.

Docket No. \_\_\_\_\_

\_\_\_\_\_ Landowner(s)

**APPLICATION FOR  
LAND USE OR NATURAL GAS  
PIPELINE MEDIATION  
(5 M.R.S.A. §§ 3341, 3345)**

and

\_\_\_\_\_ Governmental Entity

I hereby apply for mediation in this land use or natural gas pipeline matter, and I have paid the mediation fee of \$175.00 for up to four hours of mediation to the Clerk of Court.

I hereby certify that I own the property at the following locations that is the subject of a dispute:

(fill in address/city/town) \_\_\_\_\_

\_\_\_\_\_

I wish to mediate the following dispute concerning my property: (describe the nature of the dispute) \_\_\_\_\_

\_\_\_\_\_

The other parties to the dispute are: (identify) \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
Name

\_\_\_\_\_  
Street Address/P.O. Box

\_\_\_\_\_  
City/State/Zip

\_\_\_\_\_  
Daytime Tel. No.

CADRES rev. 9/99

NOTE TO CLERK; PLEASE SEND A COPY TO CADRES

## **APPENDIX E**

**List of items that are “not compensable” and not to be included in appraisals submitted to the Maine Department of Transportation**

Attachment Number 1

APPRAISAL REPORT

MAINE DEPARTMENT OF TRANSPORTATION

- A. The following is a list of frequently encountered items that are not compensable under our State Law, and must not be included as elements of damage in appraisals submitted to the Maine Department of Transportation.
1. Removal costs and breakage of personal property.
  2. Excess costs of securing new premises over and above market value of old premises.
  3. Damage expressed in terms of lost opportunity to secure an income, or interruption of business.
  4. Inferiority of new location.
  5. The lack of acceptable substitute location.
  6. Loss of good will.
  7. Loss of profitable contracts.
  8. Damages resulting from frustrations of contracts.
  9. Loss of privacy.
  10. Inconvenience to owner or occupant.
  11. Speculative damages (Includes all of above.)
  12. Decrease in value of business located on the premises.
  13. Value to the taker.
  14. Value to the owner.
  15. Damages due to exercise of police power incorporated in design of new facility.
  16. Circuity of travel.
- B. The following rule regarding benefits must be observed in any appraisal submitted to the Maine Department of Transportation:
- Special benefits, but not general benefits, may be set-off against any severance damage to the remaining real property. In all cases, compensation for the part taken, as it contributes to the whole property "Before the Taking", shall be provided.
- If the appraiser has any questions on any of the above, he should contact the Maine Department of Transportation Real Estate Services Manager.
- C. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which the property is to be acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner(s), shall be disregarded in determining the estimate of compensation for each property.

## **APPENDIX F**

### **Summary of Takings Laws in Other States**

## **Outline of Other State's Takings Laws**

### **Florida's Bert Harris Act and Dispute Resolution Act**

The Bert Harris Act is prospective and only applies to restrictions adopted after May 11, 1995. The Act creates a right of action to recover financial compensation or other relief when a government regulation "inordinately burden[s] an existing use of real property."

#### **Definitions and threshold requirements**

- The Act defines a future use to be an "existing use" if the use:
  1. Is "reasonably foreseeable;"
  2. Is "non-speculative;"
  3. Is "suitable for the subject real property;"
  4. Is "compatible with adjacent land uses;" and
  5. Creates "an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property."
- The Act defines "inordinate burden" as a government action that has directly restricted or limited the use of real property such that:
  1. The property owner is permanently unable to attain the reasonable, investment-backed expectations for the existing (i.e., or proposed) use of the real property; or
  2. The property owner is left with existing (i.e., or proposed) uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.
- The Act includes several exemptions:
  1. "Temporary" limitations on real property use (e.g., development moratoria);
  2. Impacts to private property resulting from government efforts to abate or otherwise address a "public nuisance" or a "noxious use of private property;"
  3. Government actions "taken to grant relief" to a developer or other property owner under the Act (i.e., neighbors cannot assert a claim under the Act on the ground that they have been harmed by the government granting relief to a claimant objecting to regulations as too burdensome).

#### **Claim process**

- A landowner must submit a "claim" along with a "bona fide, valid appraisal demonstrating the loss in fair market value to the real property."
- The government must then provide written notice of the claim to members of the public who were "parties" to the underlying administrative proceeding, owners of

contiguous properties, and the Florida Department of Legal Affairs within 180 days of receipt of the claim (90 days in the case of agricultural lands).

- The government must respond with a “written settlement offer.” The offer can be among other things, the rejection of the claim, the modification of the regulatory decision, the purchase of the property, or new conditions or mitigation measures.

### **Settlement/compensation**

- If a settlement is reached and the government agrees to modify its decision, the government must ensure that “the relief granted shall protect the public interest served by the regulations at issue and be the appropriate relief necessary to prevent the Government’s regulatory effort from inordinately burdening the property.” If the settlement “would have the effect of contravening the application of a statute as it would otherwise apply to the subject real property,” the parties must obtain court approval of the agreement.
- If the parties fail to reach agreement, the government must issue a “ripeness decision” specifying what property uses it will allow. Upon issuance of this decision, or if the government fails to issue a decision, the landowner can proceed to sue in court for “compensation” or other relief.
- If the court determines that the government action imposed an inordinate burden it must impanel a jury to fix appropriate payment. Compensation is determined by calculating the difference in the fair market value of the property, as it existed at the time of the governmental action without the regulation and with the regulation considering the settlement offer together with the ripeness decision.

### **Attorney fees**

- A prevailing claimant may recover reasonable attorney fees and costs from the other party if the court determines that “the settlement offer, including the ripeness decision, of the governmental entity did not constitute a bona fide offer to the property owner which reasonably would have resolved the claim.”
- If the government prevails it is also entitled to recover reasonable fees and costs from a property claimant if the court determines that the property owner declined a reasonable settlement offer.

### **Sovereign immunity**

- The Bert Harris Act states “his [Act] does not affect the sovereign immunity of government.” The Florida Third District Court of Appeals ruled that it should not be read to prohibit an award of monetary compensation, reasoning that the contrary reading would effectively gut the Act.



### **Public input.**

- The Act does not expressly speak to the rights of the public to participate in proceedings under the Act.

## ***Florida's Dispute Resolution Act***

Adopted along with the Bert Harris act, the Dispute Resolution Act gives landowners an opportunity to seek regulatory relief. The Act was designed to encourage informal resolution of property owners' complaints about regulatory burdens. The Dispute Resolution Act applies regardless of when the regulation was adopted.

### **Process**

- A landowner who believes that a regulation "is unreasonable or unfairly burdens the use of the owner's real property" may initiate a proceeding under the Dispute Resolution Act by "fil[ing] a request for relief" with the government. The Act does not define the terms "unreasonable" or "unfair." The government must forward the request for relief to a special magistrate who is acceptable to both parties.
- The government must provide a copy of the request for relief to contiguous property owners and to "[a]ny substantially affected party" who substantively participated in the underlying administrative proceeding. Participation in the proceeding "is limited to addressing issues raised regarding alternatives, variances, or other types of adjustment to the development order or enforcement action which may impact their substantial interests."

### **Hearing**

- The magistrate's primary responsibility is "to facilitate a resolution of the conflict" that addresses the claimant's concerns and reduces regulatory burdens. Following the hearing, the magistrate must prepare a written recommendation based on her findings, including any recommendations that the government "reduce[] restraints on the use of the owner's real property."
- The magistrate's findings "may serve as an indication of sufficient hardship to support modification, variances, or special exemptions," suggesting the findings may provide a legal basis for challenging the government's failure to grant regulatory relief.

### **Settlement**

- The government must respond to the magistrate's recommendation by accepting, modifying, or rejecting it. If the landowner and the government agree on how to modify the restrictions, the government will proceed to implement the resolution through the normal land use process.
- If the government rejects the magistrate's recommendations and the parties cannot reach an alternative agreement, the government must issue "a written decision . . . that describes as specifically as possible the use or uses available to the subject real property."

## ***Oregon's Measure 37 and Measure 49***

### ***Measure 37***

#### **Application**

- Measure 37 was retroactive and required state and local governments to pay "just compensation" when it "enacts or enforces" a regulatory restriction that "reduce[s] the fair market value of property, or any interest therein."

#### **Process**

- To initiate a claim, a landowner must submit a "written demand." The measure did not prescribe any information that must be submitted with the written demand. State or local governments could adopt "procedures for the processing of claims," but a landowner's claim could not be rejected for failing to follow these procedures.
- In addition, Measure 37 provided that a "decision by a governing body under this act shall not be considered a land use decision . . ." making those government actions not subject to administrative review by Oregon's Land Use Board of Appeals.
- The measure also provided a two year deadline for the filing of facial claims based on regulations in place on the date Measure 37 was adopted. Claims after that based on those regulations could only be brought on an as applied basis.

#### **Compensation or waiver**

- Government entities could "modify, remove, or not apply" the challenged regulation within a certain amount of time after the claim was filed to avoid liability ("pay or waive").
- If the government elected to pay, the "just compensation" must "be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner made

written demand for compensation.” Compensation could be paid from funds “specifically allocated” for that purpose or from other “available funds.” No funds were made available under the Act.

- If the government was unable or unwilling to pay, “the governing body responsible for enacting the land use regulation” was authorized to “modify, remove, or not to apply the land use regulation . . . to allow the owner to use the property for a use permitted at the time the owner acquired the property.”

### **Exceptions**

- Measure 37 contained five exemptions for regulations that:
  1. Restricted “activities commonly and historically recognized as public nuisances under common law;”
  2. Regulated “activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;”
  3. Were necessary “to comply with federal law;”
  4. Restricted “the use of a property for the purpose of selling pornography or performing nude dancing;” or
  5. Were enacted before the claimant, or a family member, acquired the property.

### ***Measure 49***

Measure 49 was passed by voters on November 6, 2007, replacing Measure 37.

### **Application**

- Other than dealing with Measure 37 claims, Measure 49 is prospective regarding new regulations that restrict residential development, farm or forest practices. Affected landowners may file claims seeking compensation or a waiver. However, claims are no longer allowed for new commercial or new industrial uses.
- Measure 49 defines a reduction in “fair market value” as being “equal to the decrease, if any, in the fair market value of the property from the date that is one year before the enactment of the land use regulation to the date that is one year after enactment, plus interest.” This methodology applies to certain prior Measure 37 claims and prospectively to claims based on new regulation.

### **Compensation, waiver or new development**

- If a landowner can demonstrate a loss in value, the owner is entitled either to compensation “for the reduction in value” or permission to engage in additional development “to the extent necessary to offset the reduction in fair market value of the

property.”

- Development rights authorized under Measure 49 are not personal to the claimant and may be sold and transferred to new owners of the property.

### **Addressing Measure 37 claims**

Measure 49 allows landowners who previously filed valid claims (or had already been granted waivers) under Measure 37 to seek permission to construct up to:

1. Three dwelling units on land outside of urban growth boundaries, or
2. Ten units on land inside urban growth boundaries or land outside urban growth boundaries that is not high-value farmland or high-value forestland or in a ground water restricted area.

### **Process**

To obtain permission to construct up to three dwellings, the owner is required to show that a current regulation prohibits the construction of units that were otherwise permitted at the time he acquired the property. To take advantage of the ten-unit option, the claimant also has to demonstrate, using a new formula for calculating alleged loss in value, that the adoption of the regulation reduced the value of the property.

## ***The Louisiana Right to Farm Act***

### **Application**

- The Act was adopted in 1995. It is prospective in nature and only applies to farmland and forestland.
- It defines a taking as a “reduction of twenty percent or more” of the value of “the affected portion of any parcel” agricultural or forest land.
- An owner is not required to convey title to the property to the public as a condition of receiving payment. If an owner prevails in a suit under the measure, the government has the option of rescinding the regulation, but the government must pay for the diminution in value while the law.

### **Cause of action**

- The landowner may bring an action in court to determine whether the governmental action caused a diminution in value of a parcel of agricultural or forestry land.

- The owner must show that the diminution in value did not result from a restriction or prohibition of a use of the property that was not already prohibited by law.

### **Determination of property value**

The Act provides that in determining the assessed value of real agricultural or forestry land, a governing authority must shall reduce the assessment by the diminution in value as determined by the court or, in the absence of a court determination, by the appropriate assessing official. No such assessment shall be retroactive.

### **Impact assessment**

- The Act requires the governmental entity to prepare a written assessment of any proposed action that will likely result in a diminution in value of private agricultural or forestry property.
- The commissioner of agriculture and forestry shall promulgate guidelines for owners of private agricultural property and governmental entities to assist in determining what governmental actions are likely to result in a diminution of value of private agricultural property.

### **Compensation**

- Upon a determination that a governmental action caused a diminution in value of private agricultural or forestry property, the owner is entitled to:
  1. Recover a sum equal to the diminution in value of the property and retain title to the property; or
  2. Recover the entire fair market value of the property prior to the diminution in value of twenty percent or more and transfer title to the property to the governmental entity.
- If the claimant prevails, the governmental entity may rescind or repeal the regulation which caused the diminution in value of the property but the governmental entity is still liable for damages sustained by the property owner.

### **Attorney fees**

The court may award costs of litigation, including reasonable attorney and expert witness fees, to the prevailing party in addition to other remedies provided by law.

## ***The Mississippi Agricultural and Forestry Activities Act***

### **Application**

- Enacted in 1994, it is very similar to the Louisiana measure and applies only prospectively.
- The Act defines a taking to mean a prohibition or restriction on an owner's use of property for forestry or agricultural activities that results in a reduction in the fair market value of the property "or any part or parcel thereof ...by 40 percent or more."

### **Cause of action/compensation**

- The Act authorizes owners to sue for money damages and allows an owner who recovers payment to retain title to the property, unless the reduction in property rises to the "100%" level.
- If the government is unable to make a judicially mandated payment, the government action is automatically rescinded and if the government is found liable, officials have the option of rescinding the regulation, but the state must pay for the period the regulation was in place.
- Like the Louisiana measure, the act is limited to restrictions on forest and agricultural lands. It applies only prospectively, and includes several exceptions, but does not contain the broad exemptions found in the Louisiana statute.

## ***The Texas Real Property Rights Preservation Act***

### **Application**

- In 1995, the Texas legislature passed the Texas Real Property Rights Preservation Act. The Act is prospective and defines a taking as a government action which causes "a reduction of at least 25 percent in the market value of the affected private real property." It applies to state agencies and political subdivisions but not cities.
- Applies only to governmental actions for adoption of a rule, ordinance or guideline with a number of exceptions involving federal mandates, public health and safety and certain hunting and fishing regulations.

### **Initiating a claim**

- Land owner must file a claim within 180 days of the date that landowner “knew or should have known that the governmental action restricted or limited the landowner’s right in the private real property. Once filed, the court finds a taking when a governmental action ... and is the producing cause of a reduction of at least 25 percent in the market value of the affected real property.”

### **Taking Impact Assessment**

- It requires government agencies to prepare takings impact assessments if an agency action “may result” in a taking as defined in the act. If an agency fails to prepare the assessment when one is required, an owner can sue to invalidate the governmental action on that basis.

### **Remedies and attorney fees**

- The governmental entity may opt to rescind the regulation or pay compensation for the takings from the date regulatory takings occurred.
- The prevailing party may be awarded attorney fees.

## ***Arizona’s Private Property Rights Protection Act***

### **Application**

- In 2006, Proposition 207 was enacted by the people of Arizona. The Act is prospective and provides that “If the existing rights to use, divide, sell or possess private real property are reduced by the enactment or applicability of any land use law enacted after the date the property is transferred to the owner and such action reduces the fair market value of the property the owner is entitled to just compensation... [from the state of political subdivision of the state] that enacted the land use law.”
- Provides a number of exceptions including federal mandates, protection of the public’s health and safety, public nuisances or do not directly regulate an owner’s land.

### **Initiating a claim**

- Land owner must file a claim within 3 years within the effective date of the law or the date the law applies to the landowners property whichever is later.
- The landowner is not required to submit a land use application as a prerequisite to filing a claim for compensation. The landowner must submit a written demand for a specific amount of compensation to the governmental entity that enacted the law or

regulation and after 90 days the regulation continues to apply to the landowner, the landowner may proceed to court.

### **Remedies and attorney fees**

- The governmental entity can avoid going to court by reaching an agreement with the landowner or by amending or waiving the land use regulation as it applies to the landowner. A waiver or amendment of the land use regulation runs with the land.
- The Act defines “just compensation” to mean “the sum of money that is equal to the reduction in fair market value of the property of the property resulting from the land use law as of the date of [its] enactment....”
- The Act defines “fair market value” to mean “the most likely price estimate in terms of money which the land would bring if exposed for sale in the open market...”
- A property owner is not liable for attorney fees or court costs. A prevailing plaintiff may recover reasonable attorney fees, costs and expenses and may be awarded attorney fees.



## **APPENDIX G**

**Summary of the Subcommittee Meeting on October 17, 2011**

## Regulatory Takings Subcommittee Summary

Prepared by OPLA

October 17, 2011

\*The following summary includes some of the comments made at the subcommittee meeting and with the possible exception of the enumerated items under section 1, does not reflect a consensus of the subcommittee. The sections follow the agenda outline.

Present – Rep. Nass, Rep. Priest, Don White, Peggy Bensinger, Catherine Connors, Cathy Johnson, Clark Granger and Bucket Davis

1. Improve current land use mediation program. The program is underutilized and the following could be considered to improve awareness of the program:

- A. State agencies promote the mediation program on websites;
- B. Direct CADRES to provide municipalities with copies of brochures about the mediation program;
- C. CADRES promote the program on its web site;
- D. Have the Governor's small business advocate provide brochures on the program;
- E. Require agencies to send out information on mediation along with right of appeal when make regulatory decisions;
- F. Require mediation before go to court; and
- G. Include mediation option in licensing process.

Comment made that mediation is not being used currently because there is little to be mediated until a change is made regarding regulatory takings.

2. Whether to expand AG's considerations when reviewing proposed rules.

- The AG representative reported that the office is involved in regulatory drafting process before the posting of proposed rules and has asked agencies to write in variances (not waivers) in rules that the AG is concerned about from a constitutional taking stand point.
- Very few permits have been denied; NRPA projects over past 10 years – 4,448 applications, 32 denied (0.72% denied); Site Law permits over past 10 years – 2,647 applications, 3 denied (0.001% denied).
- If want a better standard than a constitution takings standard a variance, a "safety valve," may work.
- Variances are not a solution because they apply the same standard currently applied for takings and add process without result.
- Variances might not extend to a buyer.
- A remedy of compensation or waiver of the regulation on the taken property is needed.

3. How to ensure Legislature is more aware of regulatory takings.

- Propose a bill.
- Both negative and positive economic impacts need to be taken into account; we don't require landowners to compensate the state when property values go up due to regulation.

- Does the fair market value reflect the positive economic impacts from a regulation that would be lost for properties adjacent to a parcel where the regulation has been waived.
- The fair market value does take both positive and negative impacts into account.
- Taking laws are intended to help property owners that are found to be bearing a disproportional share of the burden imposed by a regulation.

4. Should changes to regulatory takings provisions apply to state law only or municipalities too.

- If require municipalities to pay compensation it will be a mandate.
- Allow municipalities to waive the regulation so no cost to them.
- The Maine Municipal Association should be invited to the next committee meeting.
- It would be more productive to wait until a concrete proposal for a change was made before bringing in MMA.

5. Retroactive or prospective only.

- Other states' regulatory takings laws apply prospectively from enactment of new regulation only.
- Prospective application has the effect of freezing regulations and agencies won't adopt or change regulations that may be subject to regulatory takings claim because of costs associated with those claims.
- Retroactively is just but too costly.
- If don't go prospectively municipalities have no incentive to grant waivers.
- Prospectively application will make governments look harder at proposed rules and limit it to those the regulator is willing to pay for.
- Current regulations do not capture all social values; question is whether those values should be paid for when it constitutes a taking of a specific property.
- Prospective takings law would not involve the constitutional standard for takings but would create a new, lower standard for determining whether a regulatory taking has occurred and a landowner is entitled to compensation.

6. Options that don't impose costs on state or local governments.

- Allow government to waive the regulation for a particular piece of property.
- There will be an increase in litigation if allow the government to waive regulations on an ad hoc basis.
- Suggested that a 50% diminution in value threshold be established so regulators will pause before moving forward with a regulation.
- A 50% standard may be too high; a 25% standard for agricultural and forestry lands would be appropriate because their land is their 401K.
- The percentage of diminution of value is fact-based, parcel by parcel and won't know that amount until trial goes through so need to set aside money for litigations on an unknown number of cases.
- Appraisers generally approach the same value so the amount of diminution will be predictable.

7. Options that do not involve waivers.

- The government could do an analysis that focuses just on properties that are at risk of being taken before moving forward with a regulation affecting those properties.
- Options without compensation or waivers are toothless.

## **APPENDIX H**

### **Study Commission on Property Rights and the Public Health, Safety and Welfare – Membership List**

**STUDY COMMISSION ON PROPERTY RIGHTS  
AND THE PUBLIC HEALTH, SAFETY AND WELFARE  
(Chapter 45, RESOLVES 1995)**

**MEMBERSHIP**

**Appointments by the Governor**

Rocko Graziano  
74 Old Kents Hill Road  
Readfield, Maine 04355

Gloria DeGrandpre  
45 Wolfe's Neck Road  
Freeport, Maine 04032

Steve Kasprzak  
P.O. Box 26  
North Waterboro, Maine 04061

**Joint Appointments by the President  
and Speaker**

Representative Edward L. Dexter  
RR 1, Box 470  
Kingfield, Maine 04947

Representative Thomas M. Tyler  
9 Deerfield Drive  
Windham, Maine 04062

Representative Ernest C. Greenlaw  
P.O. Box 331  
Sebago Lake, Maine 04075

Representative Richard A. Gould  
HCR 76, Box 260  
Greenville, Maine 04441

Senator Michael H. Michaud  
111 Main Street  
East Millinocket, Maine 04430

Representative Royce W. Perkins  
RR1, Box 22-C  
Penobscot, Maine 04476

Representative Jane W. Saxl  
37 Pond Street  
Bangor, Maine 04401

Representative Julie-Marie Robichaud  
8 Home Farm Road  
Caribou, Maine 04736

**Appointments by the President**

William Vail  
Maine Forest Products Council  
146 State Street  
Augusta, ME 04330

Gregory W. Fowler  
168 Greely Road  
Cumberland, Maine 04021

Edward B. Getty  
28 Woodcrest Road  
Windham, Maine 04062

**Appointments by the Speaker**

Beth Nagusky  
Natural Resources Council of Maine  
271 State Street  
Augusta, Maine 04330-6900

Sandra Neilly  
Maine Audubon  
P.O. Box 6009  
Falmouth, Maine 04105-6009

Benjamin Lund  
Brann & Isaacson  
P.O. Box 3070  
Lewiston, Maine 04243-3070

**Appointments by the Judiciary  
Committee Chairs**

Senator S. Peter Mills  
Chair of Commission  
P.O. Box 9  
Skowhegan, Maine 04976

Representative Sharon Anglin Treat  
P.O. Box 12  
Gardiner, Maine 04345

Representative Robert R. Hartnett  
5 Bishop Farm Road  
Freeport, Maine 04032

Representative Richard A. Nass  
P.O. Box 174  
Acton, Maine 04001

Representative Elizabeth Watson  
138 Maine Avenue  
Farmingdale, Maine 04344

**Ex Officio**

Evan Richert (Governor's designee)  
State Planning Office  
38 State House Station  
Augusta, Maine 04333

Jeff Pidot  
(Attorney General's designee)  
6 State House Station  
Augusta, Maine 04333-0006

8240LHS  
Revised 11/13/95

## **APPENDIX I**

**Notes on Takings – presented by Peter Mills, November 4, 2011**

## Notes on Takings

Regulations come in at least three flavors:

1. Those that benefit all property owners and would seldom be contested.

The best example is the requirement to pay \$16 to file a deed in the county registry to prove ownership. The maintenance of a common registry and a court system to defend land titles adds inestimable value to everyone's land.

Ask yourself how much would it be worth to own ten acres in the outskirts of Mogadishu. The land would have no value unless you could afford a standing army to defend it. In Somalia the owner with the biggest tribe wins.

The original and continuing purpose of most government regulation is to add value to property and to continue protecting that value.

2. Those regulations that benefit some owners and burden others.

Zoning is the best example. A common zoning plan usually adds aggregate value to the entire community, but some parcels will be reduced in value because of diminished opportunities. (See chart on reverse.)

3. Those that burden many owners to serve a greater good.

Environmental regulations on wetlands, vernal pools, shoreland zoning and timber harvesting are prime examples.

In many cases there is a tangible or intangible benefit to landowners to offset the regulatory taking. 50 years ago, land along the Kennebec River was worth nothing. The water smelled and was full of sewage and logs. But owners along the river were free to do whatever they wanted to. Many, like George Mitchell's immigrant family living at Head of Falls, couldn't wait to move back from the river as soon as they could afford to.

Now, with zoning, lot size and discharge restrictions, shoreland is worth more than back land; but owners are highly restricted in what they can do.

Two big issues:

1. Balancing benefits against loss. For landowners who gain, do you make them pay in?  
E.g., shoreland zoning, the parallel to interchange development.

2. "Parcelization" and Equity.

The percentage impact on a small landowner is often greater than on a large landowner.

Think of the impact of a vernal pool on 1 acre versus a vernal pool on 100 acres.

Should the large landowner be paid nothing?

What if a large landowner owns many parcels, some of which are highly affected while others are not? Should it make any difference that the land is owned in many pieces?



SUBDIVISION

A STREET

1	2	3	4	5	6	7	8	9	10	11	
12	13	14	15	16	17	18	19	20	21	22	

B STREET

## **APPENDIX J**

**Information Regarding Specific Cases of Laws or Regulations Affecting Property Values –  
Prepared by Office of Policy and Legal Analysis November 4, 2011**

## **Information Regarding Specific Cases of Laws or Regulations Affecting Property Values**

November 4, 2011

Resolve 2011, chapter 111 provided that the committee may “Examine specific cases in which state and municipal laws, regulations, ordinances and investments have affected property values in this State, both positively and negatively;”

The following is an outline of our efforts to find this information for the committee’s consideration.

### **Information from testimony on LD 1477**

**1. Don White**, President of Prentiss & Carlisle –Mr. White stressed the importance of preserving the value of land for future generations.

Example given: 100,000 acre parcel with 75 miles of shorefront on ponds greater than 10 acres

Attached to the testimony were maps of the **Jo-Mary Region** illustrating areas with code restrictions (FEMA & State plumbing code) based on soils, slope and setback and regulatory restrictions based on LURC subdistricts and lake classifications.

Rule of thumb offered in the testimony: Waterfront “buildable” lots are 100 times more valuable than generic timberland lots.

Breakdown on 75 miles of shorefront:

- 6 miles or 8 % could possibly be developed
- 2 miles or 3% probably retain their development value.
- 42% of frontage is unsuitable for development (poor soils, flood plain, slope)
- 47% of land can not be developed due to LURC land district and lake classifications

Don White agreed to ask P&C’s appraisers to provide more specific examples of value lost to regulation. E-mail correspondence and phone conversation.

**2. Rep. Kathy Chase**, example from Town of Wells:

Start with a 5.9 acres lot:

- Local requirements reduced the “buildable” area to a shape approximately 70 ft. X 230 ft.
- Setback from wading bird habitat required under DIFW rule further reduced the “buildable area” to 20x 100 feet.

Estimate that the value of the lot went from \$125,000 as a buildable lot to \$1,000 - \$1,500 as a “non-buildable” lot

### **Personal communications**

### **1. Robert Doiron, Supervisor, UT Property Tax Division, MRS**

Comments: Assessors typically do not value property based solely or primarily on land use zoning districts or restrictions. Information from real estate market sales over time is typically the best indicator of real estate value in a particular area. Many factors beyond zoning restrictions drive market and assessed value of real estate.

MRS assumes land within LURC jurisdiction (other than land enrolled under current use tax provisions - tree growth, open space or farmland) is unencumbered relative to some level of development unless the property owner (taxpayer) demonstrates that the land is encumbered in some fashion by LURC regulation, that is beyond the obvious restrictions such as shoreland zoning..

If taxpayer claims the land is not developable at all, MRS asks for a written determination from LURC to confirm this. In such cases, MRS values the parcel at 50% of its value without the encumbrances.

### **2. Drew Sigfridson, Board Member, MEREDA, broker with CG Richard Ellis/ The Boulos Company. Contacted at the suggestion of House Chair, Rep. Cushing**

Mr. Sigfridson forwarded the inquiry to Mark Plourde of Maine Valuation Co.

### **3. Mark Plourde, MAI, Maine Valuation Co. Standish Maine**

Mr. Plourde did not have time to research and provide realistic examples based on recent appraisals. He stated that there is no “one size fits all” in the appraisal world and that real estate values can vary widely from property to property. Mr. Plourde outlined regulatory impacts on private property values as related to:

- Eminent Domain (MDOT - just compensation must be paid for property rights taken)
- Conservation Easements (voluntary preservation, tax benefits)
- Working Waterfront (LMF – preservation, tax benefits)
- Tax Abatement Appeals (higher property tax expense can lower market value for income properties – market value should trump equity)
- Subdivision Regulations (impacts development density and values)
- Zoning changes (large impacts, but mostly police power)
- Shoreland Zoning (reduces utility/value of land)
- Vernal Pools (reduces utility/value of land)
- Historic Preservation façade easements (higher expenses to maintain)
- MDOT Access Management Regulations (limited curb cuts can limit utility/value of a parcel)
- Farmland/Open Space/Tree Growth classifications (reduced taxes, carrying costs benefit land owners)
- TIF (Tax Increment Financing) Districts – attracts development and narrows gap to financial feasibility of a project.

Mr. Plourde suggested speaking with Bill Van Tuinen, an assessor in Madison – Skowhegan area, Bret Vicary from Sewall Co., and Toni Kemmerle from MDOT.

**4. William Van Tuinen, Assessor.** Mr. Tuinen commented that it is difficult to quantify the effect of a land use regulation or ordinance on the value of a property. Assessing property values is complex and relies primarily on comparisons of recent sales of similar properties in the same vicinity. Many factors affect property values over time. A person who is knowledgeable of the real estate market may anticipate a change in property values in response to a new land use regulation but quantifying the near term impact and predicting the long term impact of a specific regulation is almost impossible.

Two examples illustrating factors to consider follow:

**Example 1:** A landowner owns a parcel of land with 1000 feet of shore frontage along a lake. The landowner had anticipated dividing the parcel into 10 residential lots, each with 100 feet of frontage. In 1990 shoreland zoning standards changed to require a minimum of 200 ft. shore frontage for each residential lot. The owner can now market only 5 lots rather than the 10 originally anticipated but not surveyed, plotted and recorded at the time of the change. The total realized from the sale of 5 lots each with 200 ft. of frontage is unlikely to equal the total of 10 lots each with 100 ft. of frontage. The value of the 1000 ft of shorefront has been reduced. Increases in minimum shore frontage and lot size may have the desired intent of protecting water quality. In the long term this may positively impact property values around the entire lake but for the landowner with the 1000 ft of shorefront who wants to sell now the change in minimum frontage has resulted in a diminution of value.

**Example 2:** A person owns a shorefront camp built before shoreland zoning was enacted in 1971. The camp sits very close to the water with no buffer and great views of the lake. The camp is grandfathered and can be sold as is. An adjacent lot has not been built on. The lot is taxed at a value less than the adjacent lot with the camp. The frontage is similar and the lots are approximately the same size.

The camp owner believes his taxes (that portion attributed to the lot) are too high and files for abatement. The appraiser for the town examines the lots and concludes that the higher value for the camp owner's lot is justifiably assessed. Because of setbacks and restrictions on clearing vegetation, anyone purchasing the vacant lot will not be able to build a camp as close to the lake or with the view offered on the grandfathered lot.

## **APPENDIX K**

### **Summary of Natural Resources Protection Act (NRPA) Permitting for Significant Wildlife Habitats – Department of Environmental Protection**

Presented by the Maine Department of Environmental Protection  
To the Committee on Environment and Natural Resources

May 4, 2011

Summary of NRPA permitting  
For  
Significant Wildlife Habitats  
(Individual permits -1/2/2006-4/29/2011)\*

	SVPs	IWWHs	Shorebird	Tidal waterfowl
Approved	18	39	36	150
Denied	<u>0</u>	<u>0</u>	<u>2</u> <sup>†</sup>	<u>2</u> <sup>†</sup>
TOTAL	18	39	38	152

<sup>†</sup> These are the same two applicants: multiple habitats involved

\* as of April 29, 2011

Description of Permit denials:

Carolyn Ahlstrand, Cushing. Proposed a pier, ramp and float in Shorebird Feeding Area and Tidal Waterfowl and Wading Bird Habitat. Denied primarily due to an unreasonable impact on shorebirds.

John and Mary Anne Wasileski, Biddeford. Proposed to place large riprap in front of deteriorating seawall in a sand dune system. Denied because the riprap would reduce the width of beach available for traditional uses, cause increased erosion of adjacent properties, and restriction of shorebird feeding area.

NRPA = Natural Resources Protection Act

IWWH = High or Moderate Value Inland Waterfowl and Wading Bird Habitat

SVP = Significant Vernal Pool

SB = Shorebird Nesting, Feeding and Staging Areas